B. The Current UNEs and UNE Combinations, Including UNE-P, Should Be Maintained.

CompTel believes strongly that each and every network element that is currently on the national UNE list should remain on the list. None of the current UNEs can be self-provisioned by competitive carriers without causing them severe cost, delay and operational degradation. Likewise, none of the current UNEs, including dedicated transport, is sufficiently available from alternative providers such that competitive carriers come remotely close to matching the quality, ubiquity, cost structure or efficiency that the ILECs currently enjoy and have enjoyed for decades. CompTel supports the data submitted with the Initial Comments of NuVox, Inc.; KMC Telecom, Inc.; e.spire Communications, Inc.; Metromedia Fiber Network Services, Inc., and SniP LiNK, LLC, which demonstrates that all of the current UNEs continue to meet the impair standard. Therefore, the Commission should retain all of the current UNEs without exception or limitation.

C. UNEs Should Not Be Removed From the National List Prior to Full Compliance by the ILECs with the Unbundling Requirements.

The Commission should not consider removing a UNE from the mandatory list unless the requesting ILEC has fully complied with its obligation to provide the UNE for a commercially reasonable period of time. This rule is important for several reasons.

First, it provides the ILECs with a necessary incentive to perform their statutory obligations, both now and in the future. Unfortunately, many ILECs have decided to avoid providing UNEs in compliance with the statute and the FCC's rules in the hopes that the UNEs will be removed at the three-year review. The Commission must eliminate this invidious practice by holding that an ILEC is not qualified to seek removal of a UNE – nor may it benefit

from another party's request to remove a UNE – unless that ILEC has fully complied with the statute and the FCC's UNE regulations for a commercially reasonable period of time.

Second, the industry experience with a UNE is distorted if the UNE is not made available as required by law. In particular, some competitive carriers have been forced by the ILECs' non-compliance to obtain the necessary functionality through alternative means (or to dispense with the functionality) even when it has not been economic to do so. In light of the Commission's practice of looking at industry data when applying the impair standard, the Commission should insist that ILECs show they have complied with the *UNE Remand Order* before seeking removal of a UNE or benefiting from the removal of a UNE.

D. The Commission Should Not Retain the Three-Year Periodic Review Cycle.

In the *Notice*, the Commission seeks comment on whether it should "continue with a fixed period review process that bars the filing of petitions to remove unbundling obligations between cycles, and on whether [it] should adopt a sunset period for removing unbundling obligations."[167]

The ILECs have abused the current three-year review period, and they will abuse it again if the Commission permits them to do so. Simply put, the ILECs do not provide UNEs as required by the Act and the Commission's rules but rather wait for the next three-year review in hopes that the Commission will take more UNEs off the table. Therefore, there should be no sunset and no more fixed review periods of three years or any other predetermined length.

In order to ensure a modicum of industry stability and certainty, the Commission should adopt a policy that it will not entertain any petitions to further modify the UNE list for a

[167] *Notice* at 22818, ¶ 80.

period of three years. If the ILECs believe circumstances change such that further UNE changes should be made after that point, they are free to file rulemaking petitions.

Section 11 does not require the Commission to engage in a full review of UNEs and the UNE framework every other year.[168] In the current Notice, the Commission irresponsibly placed the entire UNE framework out for comment, which unnecessarily imposed huge burdens and costs on the telecommunications industry at a time when many carriers are least prepared to bear them and increased the uncertainty in the telecommunications marketplace. The Commission can satisfy the requirements of Section 11 by performing its own internal review, and requesting comment only where the Commission believes that changes are necessary. Under current market conditions, a brief internal review should have concluded that no changes to the current UNE rules were necessary.

V. THE COMMISSION SHOULD DECLARE THAT EELS ARE STAND-ALONE UNEs

The Commission should adopt a rule that the enhanced extended link ("EEL") is a stand-alone UNE, in addition to qualifying as a UNE combination, because it satisfies the definition of a UNE on its own. The EEL is an extended loop functionality – in effect, it constitutes a single loop extending from the customer's premises to its carrier's collocation arrangement or some other termination point (such as a point of presence). The EEL qualifies as a "facility" under the statutory definition of the term "network element" in 47 U.S.C. §153(29).[169] Just as a special access circuit is normally regarded by the FCC and the industry as a single facility, the EEL, which the FCC itself has recognized to be the functional equivalent of

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168 47 U.S.C. § 161.

169 The FCC codified a nearly verbatim definition of the term "network element" in 47 C.F.R. §51.5.

a special access circuit,[170] qualifies as a single "facility" for purposes of the definition of a "network element."

Further, there is precedent for treating an EEL as a stand-alone UNE even though it is comprised of two distinct UNEs.[171] For example, the Commission has determined that loops are UNEs, even though portions of the loop – such as the Network Interface Device ("NID") and subloop elements – are considered UNEs in their own right.[172] Moreover, the fact that an EEL passes through an ILEC's end office does not disqualify it from being a stand-alone UNE. A loop often passes through a remote terminal or interim aggregation point before reaching the ILEC's end office, yet it is still considered to be a stand-alone UNE.[173] Further, the FCC lacks the discretion not to consider whether the EEL qualifies as a stand-alone UNE. Section 10(d) prohibits the Commission from exercising its forbearance authority with respect to Section 251(c), including the UNE provisions in subsection (c)(3).[174] Therefore, the Commission must conduct the impair inquiry to determine whether the EEL qualifies as a stand-alone UNE.

CompTel believes it is important to regard the EEL as more than just a UNE combination because it affects how the impair standard applies. If it is a stand-alone UNE, then the EEL satisfies the impair standard so long as any portion of the EEL (*e.g.*, the loop) passes the test. Should the Commission decide to remove or limit the dedicated transport UNE (a course of

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170 *UNE Remand Order*, 15 FCC Rcd at 3909, ¶ 481.

171 The EEL is more than simply the loop and dedicated transport UNEs. The EEL also consists of multiplexing at the ILEC's end office, thereby confirming that the EEL is something more than the mere sum of its UNE parts. This confirms that the EEL should be regarded as a stand-alone UNE, not merely a UNE combination.

172 47 C.F.R. §51.319.

173 *Line Sharing Reconsideration Order*, 16 FCC Rcd 2101 (2001).

174 47 U.S.C. §160(d).

action which CompTel strongly opposes), such a decision would have no impact on the availability of the EEL as a mandatory UNE.

VI. THE COMMISSION SHOULD IMMEDIATELY BRING THE CURRENT RULES INTO COMPLIANCE WITH THE STATUTE

A. The Commission Should Immediately Lift the Use Restrictions on EELs.

The Commission must immediately remove all restrictions on the use of UNEs, including, in particular, its pernicious restrictions on the EEL. The Commission's oft-stated commitment to promoting local competition is belied by its aggressive actions to prevent requesting carriers from obtaining UNE combinations, including the EEL, for the provision of telecommunications services. If the Commission truly wants to promote local competition, it should make all UNEs immediately available immediately without restrictions. The EEL is a uniquely powerful engine for promoting new entry and local competition, and new entrants are entitled to obtain and use EELs without restrictions under the 1996 Act.[175]

1. UNE restrictions are contrary to the 1996 Act.

Restrictions on the services which UNEs may be used to provide are inconsistent with, and prohibited by, the statutory language of the 1996 Act. Section 251(c)(3) states that "any requesting telecommunications carrier" is entitled to obtain "nondiscriminatory access to network elements on an unbundled basis" from an ILEC "for the provision of a

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[175] In declaring UNE restrictions contrary to the statute, the Commission should clarify that any requesting carrier may obtain the shared transport UNE for the provision of any services. In 1997 the FCC decided that a new entrant can use shared transport to provide local exchange services, but held off ruling on whether an entrant also can use this UNE to provide exchange access and other services. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460, 12495, ¶ 60 (1997).

telecommunications service."[176] That section further provides that an ILEC must provide UNEs in combinations so that requesting carriers can provide "such telecommunications service."[177] Section 153(29) of the Act defines "network element" as a "facility or equipment used in the provision of a telecommunications service," and it makes clear that the term includes all "features, functions, and capabilities that are provided by means of such facility or equipment."[178]

These provisions entitle any requesting carrier to obtain and use any mandatory UNE for the provision of any telecommunications service, and they leave no room for FCC regulations limiting UNEs to particular services or restricting access to UNEs based on the services that the carrier offers. Restrictions on the use of UNEs would result in some requesting carriers being denied access contrary to the statutory requirement that "any" such carrier should have access to UNEs. Similarly, such restrictions would contravene Section 251(c)(3) by preventing a carrier from using a UNE to provide "a telecommunications service" of its choice. Certainly, use restrictions would materially modify the definition of "network element" as a facility, equipment or functionality. Instead, such restrictions would impermissibly shrink-wrap network elements based on the services they may be used to provide. The statutory UNE regime entitles the carrier, not the regulator, to determine whether and how UNEs will be used to provide telecommunications services.

For years after enactment of the 1996 Act, the FCC read these provisions in the 1996 Act expressly to prohibit all restrictions on the use of UNEs. As the FCC has explained,

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176 47 U.S.C. §251(c)(3).

177 *Id.*

178 47 U.S.C. §153(29).

"network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."[179] Thus, "when interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service'" or any other particular "service."[180] Instead, the carriers are purchasing access to a functionality that can be used to provide a service by itself or combined with other functionalities. Therefore, according to the FCC, once a carrier purchases access to a UNE, the carrier can use that UNE at its own discretion to provide any service the UNE is capable of supporting. As expressly provided in FCC Rule 51.307(c), a carrier may "provide any telecommunications service that can be offered by means of [the] network element."[181]

In the *Local Competition Order* in August 1996, the FCC noted that a carrier may not be prevented from using a UNE to provide access to long distance services.[182] The FCC held that the plain statutory language entitles "interexchange carriers and all other requesting carriers to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers."[183] In the words of the FCC,

> [w]e believe that our interpretation of [S]ection 251(c)(3) in the NPRM is ***compelled by the plain language of the Act.*** As we observed in the NPRM, [S]ection 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a 'telecommunications service,' and exchange access and interexchange services are telecommunications services. Moreover, [S]ection 251(c)(3) does

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179 *Local Competition Order*, 11 FCC Rcd at 15634, ¶ 264.

180 *Id.* at 15680, ¶ 358.

181 47 C.F.R. §51.307(c).

182 *See* 47 C.F.R. §51.309(b).

183 *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356; *see also UNE Remand Order*, 15 FCC Rcd at 3911-12, ¶ 484.

> not impose restrictions on the ability of requesting carriers 'to combine such elements in order to provide such telecommunications service[s].' Thus, we find that there is ***no statutory basis upon which we could reach a different conclusion*** for the long term.[184]

The FCC codified its conclusion that the Act does not permit use restrictions in Rule 51.309(a), and Rule 51.309(b) confirms that a requesting carrier may use a UNE to provide long distance services.[185] In the *UNE Remand Order,* the FCC reemphasized that the plain and unambiguous language of the Act compelled its conclusion that the Act does not permit use restrictions, and the FCC expressly reaffirmed Rule 51.309(a), noting that no parties had challenged that rule in court.[186]

2. Use restrictions do not promote any valid public policy objectives.

Even assuming *arguendo* that the Commission has authority to adopt UNE restrictions in order to promote public policy objectives, there is no legitimate policy objective which supports use restrictions. As noted above (*supra* Section III.D.), putative concerns about universal service and interstate access charges cannot justify any restrictions on the availability or use of UNEs by new entrants.

Nor is it permissible for the FCC to adopt restrictions in order to protect specific competitors or a specific class of competitors. The use of UNEs to enter the local market is a valid entry strategy, and the 1996 Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy."[187] The FCC itself has recognized that protecting an entity from

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184 *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356 (emphasis added).

185 47 C.F.R. §§51.309(a)-(b).

186 *UNE Remand Order,* 15 FCC Rcd at 3911-12, ¶ 484.

187 *Local Competition Order*, 11 FCC Rcd at 15509, ¶ 12.

competition is not a legitimate policy objective under the 1996 Act.[188] This Court has said the same thing. In the *CompTel Transport Appeal*, this Court affirmed the traditional agency view that "the goal of the agency 'is to promote competition . . . not to protect competitors.'"[189]

It is equally indefensible for the FCC to suggest that UNE restrictions are necessary for the ILECs to maintain supra-competitive special access rates as a pricing umbrella for facilities-based entrants. Assuming that EELs are priced in compliance with the statutory pricing standard,[190] an efficient facilities-based competitor need not fear being unfairly undercut by the availability of EELs under Section 251's UNE regime. While an inefficient facilities-based LEC might see its market position erode as EELs become widely available, "[t]he failure of inefficient firms is to be expected in a competitive market, not deplored as a sign that the market has failed."[191] There is no valid public policy justification for preferring the market position of inefficient facilities-based LECs over the competitive interests of efficient carriers desiring to use UNEs for the provision of local and long distance services. To the contrary, as the FCC has often recognized, protecting inefficient carriers would subvert the public interest by discouraging efficient investment and entry.[192]

At bottom, any decision to impose restrictions on UNEs in order to bolster above-cost pricing by ILECs or other competitors is an attack on the TELRIC pricing methodology

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188 *Id.*, ¶ 725 ("The fact that access or universal service reform have not been completed by that date would not be a sufficient justification [for extending the use restriction], *nor would any actual or asserted harm to the financial status of the incumbent LECs.*" (emphasis added)).

189 *CompTel Transport Appeal,* 87 F.3d at 530 (citation omitted); *see also Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

190 47 U.S.C. §252(d)(1).

191 *CompTel Transport Appeal,* 87 F.3d at 530.

192 *Line Sharing Order*, 14 FCC Rcd at 20936-37, ¶¶ 49-50 (*citing Local Competition Order*, 11 FCC Rcd at ¶ 620).

established in Section 252(d)(1). The principle upon which TELRIC pricing is based is that "new entrants should make their decisions whether to purchase UNEs or build their own facilities based on the relative economic costs of these options."[193] The Commission established TELRIC pricing in order to ensure that the 1996 Act is implemented in a manner that is "pro-competition" rather than "pro-competitor."[194] The Commission forgot that fundamental lesson when it adopted EEL restrictions to bestow monetary benefits upon the ILECs, and it should take advantage of this opportunity to correct that mistake.

The Commission has recognized that if ILECs were allowed to charge rates that exceed TELRIC, new entrants' investment decisions would be distorted, and would lead to inefficient entry and investment decisions.[195] Because use restrictions on UNEs protect above-TELRIC pricing of certain network functionalities, any such restrictions would induce inefficient investment by sending distorted pricing signals to the industry. The Commission's UNE restrictions have violated bedrock Commission policies regarding the need for cost-based pricing of wholesale inputs in order to maximize consumer welfare under the Communications Act of 1934.

B. The Commission Should Lift the Co-Mingling and Collocation Restrictions On EELs.

The Commission seeks "comment specifically on the co-mingling restrictions currently in place," and whether there are "any other legal or policy reasons for permitting or prohibiting co-mingling restrictions"[196] The *Notice* also asks whether the FCC should continue

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193 *Id.*

194 *Id.* at ¶ 618.

195 *See id.* at ¶ 620.

196 *Notice*, 16 FCC Rcd at 22814, ¶ 70.

"to impose limits on the ability of requesting carriers to combine certain network elements and services in order to serve a specific customer or class of customers."[197] CompTel urges the Commission to lift all limits on the ability of requesting carriers to combine network elements and services in order to serve a specific customer or class of customers, including specifically the co-mingling and collocation restrictions on EELs.

The Commission inserted the "co-mingling" prohibition into all three safe harbors established in the *Supplemental Order Clarification* for determining when a requesting carrier qualifies for EELs by satisfying the requirement of a significant amount of local traffic.[198] The Commission later clarified the broad scope of the co-mingling prohibition in the *Net2000 Decision*.[199]

The Commission should eliminate the co-mingling prohibition because it has often prevents new entrants from obtaining EELs to provide any telecommunications services whatsoever. This result far exceeds the Commission's asserted objective of limiting EELs to those carriers providing a significant amount of local traffic. There is significant record evidence confirming that the ILECs have manipulated the co-mingling prohibition into the functional equivalent of a blanket prohibition against EELs.[200] Only those enlightened states that have promoted EELs above and beyond what the FCC's rules require have succeeded in stimulating local competition through the use of EELs.

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197 *Id.* at 22814, ¶ 69.

198 *Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28.

199 *Net2000 Communications, Inc. v. Verizon*, File No. EB-00-018, FCC 01-381, 2002 LEXIS 119, rel. Jan. 9, 2002, ¶¶ 28-30 ("*Net2000 Decision*").

200 *E.g.*, Letter from S. Augustino, Kelley Drye & Warren LLP, to D. Attwood, FCC (Aug. 1, 2001) (CC Docket No. 96-98). Due to the FCC's co-mingling policy, Net2000 did not receive even a single EEL from Verizon despite nearly two years of informal and formal litigation at the FCC. *Id.* at 3.

Further, the co-mingling prohibition is harmful to competition because it effectively forces competitive carriers to build and operate two duplicate, inefficient networks – one for EELs traffic, another for non-EELs traffic – in order to qualify to use EELs. The cost and time burdens imposed by this requirement effectively eliminate any possible benefit that a new entrant could achieve by using an EEL in place of the ILECs' tariffed special access services. Because all carriers typically seek to engineer their networks to carry all local and exchange access traffic efficiently over the same facilities, the FCC's "co-mingling" prohibition improperly swallows the rule it is intended to modify.

Moreover, the co-mingling policy bears no discernible relationship to the Commission's ostensible goal of limiting EELs to new entrants providing a significant amount of local traffic. It is undisputed that for many new carriers providing local exchange service, the co-mingling of EELs and non-EELs traffic over interoffice facilities is the most efficient (and only cost-effective) way to route traffic. Typically, the carrier will route DS1 EELs over a DS3 interoffice facility and/or entrance facility.[201] The co-mingling prohibition effectively prevents those carriers from using EELs to offer local exchange services to subscribers in competition with ILECs, and hence it is utterly unrelated to the FCC's asserted objective of limiting EELs to local exchange traffic, and therefore should be eliminated.

Any possible concern that the co-mingling prohibition is necessary to ensure that carriers cannot apply UNE rates for non-EELs traffic is misplaced. There is no reason why a single inter-office facility cannot be priced according to two or more sets of rates. The EELs circuits can be priced at UNE rates, and the other circuits can be priced at the tariffed special

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201 *See, e.g.*, Petition of ITC^DeltaCom for Waiver of Supplemental Order Clarification, CC Docket No. 96-98 (filed Aug. 16, 2001).

access rates. This pricing mechanism is known as ratcheting, and it has been in place for switched and special access services for the better part of two decades.[202] Through ratcheting, the Commission can effectively ensure that EELs pricing is limited to EELs circuits. While the ILECs may need to make billing and other changes necessary to implement ratcheting, these modest burdens should not be permitted to prevent new entrants from using EELs as a tool for promoting local competition. All UNE obligations entail some resource expenditure by the ILECs, and the FCC should not shy away from requiring the ILECs to do what is necessary for new entrants to obtain and use EELs.

Lastly, the Commission should remove the restriction in two of its three EELs safe harbors that require the EEL to terminate in the requesting carrier's collocation arrangement. This requirement is a regulatory anomaly, and no longer serves any permissible purpose. The FCC originally adopted the collocation carve-out in the *UNE Remand Order*.[203] At that time, the Commission determined that the collocation requirement, by itself, would be sufficient to prevent undue erosion of the ILECs' special access revenue stream caused by EELs. However, the FCC changed its mind less than one month later in the *Supplemental Order*, and established the broader restriction that EELs be available only when used for a significant amount of local traffic.[204] This new policy effectively superseded the previous collocation carve-out, but the Commission nevertheless retained that carve-out in two of the three safe harbors it adopted in the ensuing *Supplemental Order Clarification*.[205] This collocation requirement serves no apparent

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202 *E.g., BellSouth Telecommunications, Inc.*, 14 FCC Rcd 1838, 1839, ¶ 2 n.2 (1998); *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1225 (1984).

203 *UNE Remand Order*, 15 FCC Rcd at 3913, ¶ 489.

204 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 1760 (1999).

205 *Supplemental Order Clarification*, 15 FCC Rcd at 9598-9600, ¶ 22.

useful purpose within the framework of the safe harbor regime. It should be eliminated because it is necessary neither to promote the Commission's stated goal of preserving industry stability nor to help ensure that EELs are limited to carriers providing a significant amount of local traffic.[206]

C. The Commission Should Eliminate the Switch Carve-Out.

In the *Notice*, the Commission seeks comment on "whether, for purposes of the switch carve-out, a more suitable division might lie between residences and businesses,"[207] and whether the precondition calling for the availability of EELs should be eliminated.[208] In the *UNE Remand Order*, the FCC held that requesting carriers may not obtain unbundled local switching in the highest-density zone of the 50 largest Metropolitan Statistical Areas to serve customers with more than three lines if the ILEC makes EELs available.[209] This so-called switch carve-out violates the statutory UNE regime and should be eliminated in its entirety. The Commission should require all ILECs to provide unbundled local switching as a mandatory UNE nationwide.

The FCC's apparent willingness to consider a residential cut-off – that is, permitting ILECs to refuse to provide unbundled local switching for the provision of services to business customers – is an unfortunate byproduct of the FCC's misguided granularity approach. For many of the same reasons why the service-by-service approach to the impair standard is

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206 Furthermore, the safe harbor regime is burdensome, complex and unworkable because carriers lack sufficient information to make the necessary certification at the time the EEL is requested, and have no feasible way to obtain the necessary information on a going-forward basis to ensure that they continue to comply with the safe harbor criteria. *See* Brief of Petitioner at 41-42, Competitive Telecommunications Association v. FCC, No. 00-1272 (D.C. Cir.) filed Jan. 3, 2002).

207 *Notice*, 16 FCC Rcd at 22808, ¶ 59.

208 *Id.* at 22808, ¶ 60.

209 *UNE Remand Order*, 15 FCC Rcd at 3824-26, ¶¶ 279-83.

unrealistic and unworkable, a residential/business split ignores the business needs of requesting carriers. If the FCC mandates unbundled local switching for only residential customers, a new entrant must choose between two unpalatable alternatives: (1) modifying its business plan by providing service only to residential customers; or (2) incurring enormous additional costs to obtain duplicative switching functionalities to serve both residential and business customers. The problem with (1) is that it is difficult if not impossible to achieve positive margins focusing on a single subset of subscribers with the lowest volumes. The problem with (2) is that market entry is unsustainable if duplicative inputs must be obtained to provide the desired mix of services. In both cases, the rational choice is for the carrier to exit the market, or to stay out altogether, rather than to compete against the ILEC with one hand tied behind its back. (The ILEC, it should be noted, is not required to obtain duplicative functionalities in order to offer multiple services to its subscribers.) In effect, the adoption of a residential/business split would prevent any carrier seeking to provide mass market telecommunications services based on UNEs from implementing its business plan.

Ironically, the result of adopting the residential/business split would be to severely harm the very residential consumers that the FCC claims to desire to protect. The provision of mass market services is already a relatively narrow-margin niche in the telecommunications service industry. The large majority of UNE-based carriers seeking to serve the mass market have found it necessary (not merely desirable) to serve some mixture of residential and business customers. Even a carrier intending to focus on the residential market will seek to provide service to some portion of business customers within its service area in order to reduce unit costs, maximize efficiencies, and increase margins. By preventing such a carrier from broadening its base of customers, a residential/business split narrows (and probably eliminates)

the profits that a carrier can achieve by serving residential subscribers, hence leading to fewer service providers, a dearth of service options, and less local price competition for residential subscribers.

Indeed, state commissions have concluded that eliminating the FCC's unbundled local switching restriction is necessary for meaningful competition to flourish. For example, on March 27, 2002 the New York Public Service Commission ("NYPSC") approved an incentive regulation plan for Verizon that makes the UNE platform available to business POTS customers throughout New York state, with the exception of specifically designated central offices in New York City where a customer uses 18 lines or less at a specific location.[210] The NYPSC found that providing CLECs greater access to business customers through the UNE Platform "will significantly enhance the conditions for local telecommunication competition in New York."[211] Further, the Illinois Commerce Commission and the Public Utility Commission of Texas are considering whether to eliminate the unbundled local switching restrictions altogether. In Illinois, a hearing examiner's proposed order ("HEPO") would eliminate the switching restriction based on recent amendments to state statute.[212] In Texas, the Commission is expected to affirm today its tentative conclusion that the switch port should be available on a non-

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210 Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework, Case 00-C-1945; Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case No 98-C-1357; Order Instituting Verizon Incentive Plan, Issued and Effective February 27, 2002.

211 *Id.*

212 Illinois Bell Telephone Company Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, Docket No. 01-0614, Proposed Order, March 8, 2002.

restricted basis throughout Texas.[213] The Commission should not ignore these state rulings and others that broaden the availability of the local switching UNE and related UNE combinations, particularly because the New York, Texas and Illinois commissions are the primary fact-finders for most matters concerning UNEs in their jurisdiction and base their decisions on a robust evidentiary record. The Commission should also pay particular attention to the fact that the state commissions in three of the states where competition has flourished the most have all concluded, or tentatively concluded, that increasing the unbundling obligations of the ILECs, rather than restricting access to UNEs, is the best way to foster competition as envisioned by the 1996 Act.

The focus of the impair inquiry under Section 251(d) is whether denial of access to a functionality would impair a carrier's ability to provide the "services" that it seeks to offer.[214] As before, CompTel would emphasize that the statute contains the plural term "services" rather than the singular term "service." For any carrier desiring to offer mass market services to both residential and business customers, it obviously impairs that carrier's ability to provide the "services" it seeks to offer if it may obtain unbundled local switching only for the residential portion of its customer portfolio. Congress did not charge the FCC with evaluating competing business models or forcing carriers to change their business plans in order to obtain UNEs. The impair analysis focuses on the services that the requesting carrier wants to provide, not the services that the FCC deems it appropriate for the carrier to provide. The residential/business split would represent impermissible agency interference in the business plans of new entrants, and hence must be rejected as outside the statutory impair analysis.

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213 Petition of MCImetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996, Docket No. 24542 (pending).

214 47 U.S.C. § 251(d)(2).

The Commission has refused to act on numerous petitions for reconsideration on the switch carve-out issue (including one filed by CompTel) for approximately two years. With a grudging nod to regulatory politics, some entities have sought to end regulatory gridlock on this issue by reluctantly seeking to negotiate a middle-ground line-count that is minimally acceptable to those entities. Carriers should never have to negotiate for their rights guaranteed by the 1996 Act, and thus CompTel believes that the time has come for the Commission to completely eliminate this carve-out so that new entrants can obtain unbundled local switching to provide mass market telecommunications services to all consumers.

VII. THE COMMISSION SHOULD CONVENE A FEDERAL-STATE JOINT CONFERENCE ON UNES

The Commission seeks comment on the proper roles of state commissions in the implementation of unbundling requirements for incumbent LECs, and on CompTel's proposal to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act.[215] CompTel urges the Commission to convene a Federal-State Conference on UNEs pursuant to 410(b) to facilitate, inform and coordinate its implementation of the three-year UNE review. Section 410(b) of the Communications Act authorizes the Commission to "confer with any State commission having regulatory jurisdiction with respect to carriers regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission."[216] This grant of authority plainly covers the UNE regime and the forthcoming three-year UNE review. The

215 *Notice*, 16 FCC Rcd at 22815-16, ¶¶ 75-76.

216 47 U.S.C. § 410(b).

Commission has convened such conferences in the past, most recently in 1999 with the establishment of a Joint Conference on Advanced Telecommunications Services.[217]

A Joint Conference in connection with the three-year UNE review would promote the public interest. The three-year review will depend critically upon comprehensive empirical information and the industry's experience with the current UNE regime, both of which will vary, sometimes significantly, from state to state and region to region. As a result, the hands-on participation by State regulators in the three-year UNE review through a Joint Conference is both appropriate and necessary. Moreover, State regulators play a critical role in the implementation of the UNE regime, with functions ranging from arbitrating the UNE provisions in interconnection agreements and establishing UNE prices, on the one hand, to the formal and informal adjudication of UNE disputes between ILECs and competitive carriers, on the other hand. The State regulators' experiences and perspectives on the UNE regime will be invaluable to any effort to determine which UNEs satisfy the "impair" standard in Section 251(d)(2) of the Act.

The data-intensive nature of the three-year review underscores the need for a Joint Conference on UNEs. The Commission has used the Joint Conference vehicle successfully to obtain and exchange information regarding advanced telecommunications services. A similar vehicle, including field hearings, is needed for the three-year UNE review. Particularly given the Act's purpose to ensure that the UNE regime will promote competition for ***local telecommunications services***, the direct involvement of State regulators with jurisdiction over such local services would seem to be an indispensable component of any meaningful three-year

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217 *See Federal-State Joint Conference on Advanced Telecommunications Services*, 14 FCC Rcd 17622 (1999); *see also* 47 C.F.R. Part 1, Appendix A.

UNE review. Convening a Joint Conference will permit the Commission and State regulators to act in a coordinated and cooperative fashion without unduly delaying the completion of the three-year UNE review. Given the intensively fact- and State-specific nature of the issues that will be addressed in the three-year UNE review, CompTel submits that it would be useful for the Joint Conference to prepare its own recommendations and to facilitate the independent submission by State regulators of written statements to the FCC on these critical issues.

In fact, feedback from the states on their efforts to implement local competition will be critical to this effort. Since the UNE remand order, several state commissions have either imposed additional unbundling obligations on the incumbent local exchange carrier using their own authority or through application of the FCC's necessary and impair standard. Following is an illustrative list of these state decisions:

- On February 27, 2002, the New York Public Service Commission ("NYPSC") required Verizon to expand the availability of unbundled local switching as part of an incentive regulation plan. Under this decision, Verizon will make the UNE platform available to business POTS customers throughout New York state, with the exception of specifically designated central offices in New York City where a customer uses 18 lines or less at a specific location.[218]
- Both the Public Utility Commission of Texas and the Illinois Commerce Commission are considering decisions that would eliminate the unbundled local switching restrictions imposed by the UNE Remand.
- On September 26, 2001, the Illinois Commerce Commission required SBC/Ameritech to offer its Project Pronto architecture as an end-to-end high frequency portion of the loop ("HFPL") UNE.[219] After applying the Commission's necessary and impair standard, the ICC determined that CLECs would be impaired without access to SBC's network on an unbundled basis.

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218 Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework, Case 00-C-1945; Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case No 98-C-1357; Order Instituting Verizon Incentive Plan, Issued and Effective February 27, 2002.

219 Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, 00-0393, Order on Rehearing.

More specifically, the ICC determined that the broadband and broadband/voice resale products created by the Commission's Project Pronto Waiver Order[220] were not sufficient to provide competitors a meaningful opportunity to compete.

- The Public Service Commission of Wisconsin imposed similar unbundling requirements on Project Pronto in a March 22, 2002 Order, finding that competitors will be impaired pursuant to Section 251(d)(2) if they are required to collocate a DSLAM at a remote terminal to provide DSL and if they are only provided access to Ameritech's resale offerings across the Project Pronto architecture.[221]
- The Public Utility Commission of Texas is considering an arbitration award that would impose unbundling obligations identical to the aforementioned requirements imposed by the Illinois and Wisconsin commissions.[222]

State commissions have devoted significant resources to the development of local competition in their jurisdiction, and through these efforts, have found it necessary to impose additional unbundling obligations on the ILECs. Given the FCC's desire to engage in a more granular analysis of ILEC unbundling requirements, all parties stand to benefit by providing the states a more meaningful role in this analysis given their expertise with the needs of their jurisdiction and their development of robust factual records.

If for any reason the Commission declines to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act, CompTel urges the Commission to grant the pending petition of the Promoting Active Competition Everywhere ("PACE") Coalition.[223] It is crucial that the states have a strong role in determining which network elements the ILECs must make available on an unbundled basis pursuant to Section 251(c)(3).

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220 *Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporations*, Second Memorandum Opinion and Order, 15 FCC Rcd 17521 (2000) ("*Project Pronto Waiver Order*").

221 Investigation into Ameritech Wisconsin's Unbundled Network Elements, 6720-T1-161.

222 Petition of IP Communications to Establish Expedited PUC Oversight Concerning Line Sharing Issues, Docket No. 22168 (pending).

223 Petition of PACE, CC Docket No. 01-339 (filed Feb. 6, 2002).

Apart from the procedures associated with the three-year UNE review process, CompTel urges the Commission to reaffirm that state commissions continue to have the authority under Section 251(d)(3) of the Act to impose unbundling requirements that exceed those imposed by the national UNE list.[224] CompTel strongly supports the rights of state commissions to impose unbundling requirements that exceed those imposed by the FCC. Time has shown that the states have been instrumental in fostering competition and accelerating the pace at which competitive carriers enter the telecommunications marketplace.

VIII. THE COMMISSION SHOULD ADOPT REASONABLE TRANSITION RULES FOR REMOVAL OF UNEs FROM THE NATIONAL LIST

The record in this proceeding demonstrates that we have far to go before the Commission will be able to determine that the ILECs no longer need to offer any of the current UNEs on a mandatory basis. Nevertheless, in order to prepare for the time when a carrier will not be impaired by denial of access to an ILEC element, the Commission should develop reasonable procedures for removing UNEs from the mandatory list. By adopting these transition rules long before they are needed, the Commission can increase certainty in the marketplace and ease the eventual removal of UNEs from the national list.

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224 Section 251(d)(3) provides in relevant part as follows: "[T]he Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Similarly, Section 261(c) provides that a state commission may "impos[e] requirements . . . that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. §261(c). State regulations that impose additional unbundling requirements are consistent with the Act; State regulations that remove unbundling requirements from the national UNE list are not, and thus are not permissible under the Act.

Upon a Commission determination that a particular UNE should no longer be unbundled, that UNE should undergo a "phase out" period, during which it would remain available, in order to avoid market disruption. Competitive carriers must have a minimum period before that UNE becomes unavailable to them to take whatever steps are necessary to continue the provision of service as a result of losing access to that UNE. Competitive carriers will need to make alternative arrangements to provide service without access to a UNE that is removed from the nationwide list. The alternative – allowing the ILECs to immediately cease unbundling a UNE as soon as it is removed from the list – would put competitive carriers at a great competitive disadvantage because the ILECs, and their customers, would never face the possibility that a particular UNE that is critical to their business plan may be yanked away from them before they could have alternative arrangements in place.

Any UNE phase-out period must be sufficient to allow competitive carriers the practical ability to reconfigure their operations without degrading or disrupting service to their customers. This period must take into account the length of time required to obtain alternative network arrangements from the ILECs. However, provisioning intervals have been a significant point of contention among parties and state commissions. Disagreements have arisen as to what the appropriate intervals should be, the frequency of missed provisioning intervals and what the consequences for missed intervals should be. One conclusion is clear: it takes time to configure, order, obtain, and deploy UNEs taken from the ILEC. The Commission should consider that ILEC provisioning intervals should be the minimum time required for competitive carriers to ensure that they can obtain and implement substitutable service without customer disruption.

In addition, all reconfiguration, early termination and non-recurring charges should not apply or should be waived for competitive carriers that are forced to transition from a

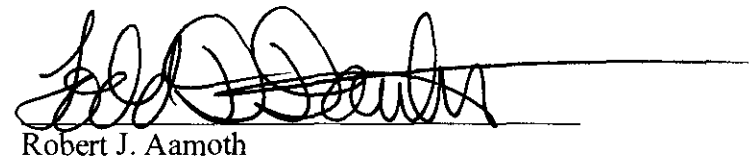
UNE that becomes unavailable as a result of being removed from the nationwide list. Upon removal from the list, ILEC provisioning of such a UNE would be left to the discretion of the individual ILEC. If an ILEC voluntarily chooses to cease making that UNE available, it should bear the cost of seeking to change the parties' relationship. Competitive carriers already will be forced to incur the costs of making alternative business and operational arrangements to accommodate the unavailability of the UNE. The competitive carrier should not be forced to pay the additional transition costs for a network change initiated by the ILEC. The Commission's UNE rules must require that ILECs bear the costs of their voluntary network changes.

The Commission should also adopt rules that grant competitive carriers a right to petition the Commission for waiver of any determination that access to a particular UNE should no longer be available. This right to petition for continued access to the UNE would allow competitive carriers the opportunity to demonstrate that removal of the UNE under specific conditions or in specific locations is inappropriate. This right would provide an important "backstop" for competitive carriers before the significant step of actually losing access to a UNE takes place. This procedural right would be especially important in smaller and rural markets that may be subsumed into locations that successfully remove a UNE from the nationwide list, but where true competitive alternatives to the UNE may not be realized sufficiently. In these markets, local competition would suffer a disadvantage if competitive carriers are not allowed to demonstrate unique circumstances that require continued access to a particular UNE.

CONCLUSION

For the foregoing reasons, CompTel urges the Commission adopt the proposals discussed in these comments.

Respectfully submitted,



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